

SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

CV 2006-010682

09/24/2007

HONORABLE KRISTIN HOFFMAN

CLERK OF THE COURT  
D. Glab  
Deputy

GARY CONDIT

BRUCE FEDER

v.

CONESTOGA MERCHANTS INC

DANIEL C BARR

MINUTE ENTRY

The Court has read and considered Defendant's Application for Attorneys' Fees and Costs, Defendant's Memorandum in Support of Application, Plaintiff's Memorandum of Law in Opposition to Defendant's Application for Attorneys' Fees, Defendant's Reply, and Supplemental Affidavit of Daniel C. Barr and Verified Statement of Costs in Support of Defendants' Motion for Attorneys' Fees and Costs.

In July 2005, the Sonoran News published an article about Darrell Wayne Condit. One line of the article stated, "Condit, whose real name is Darrell Wayne Condit, is the younger brother of former Democratic Congressman Gary Condit, who became the main focus of the Chandra Levy case in 2001, after lying to investigators about his affair with Levy."

Plaintiff filed this lawsuit against Conestoga Merchants, Inc. d/b/a Sonoran News claiming the sentence defamed him.

In his defamation action, Plaintiff had the burden of proving by clear and convincing evidence that defendant's July 2005, publication implied a false statement of fact and was made with actual malice or reckless disregard of the truth. The Court granted summary judgment for Defendant on Plaintiff's claim.

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Defendant moves for fees and nontaxable costs under A.R.S. §12-341.01 C. and A.R.S. § 12-349.

An award under either statute requires a finding that Plaintiff's claim "constitutes harassment, is groundless and is not made in good faith." The standard of proof for an award under A.R.S. §12-341.01 C. is clear and convincing evidence. The standard of proof for an award under A.R.S. § 12-349 is a preponderance of the evidence.

An objective standard is used to determine whether a claim is groundless. A subjective standard is used to determine whether the claim constitutes harassment and is not made in good faith. If a reasonable attorney should have known that a claim was frivolous, the claim is objectively groundless. If the litigant was aware that the claim or pleading should not have been brought, the claim constitutes harassment and is not brought in good faith. *Gilbert v. Board of Medical Examiners*, 155 Ariz. 169, 745 P.2d 617 (App. 1987).

An attorney has an obligation to reevaluate his position in bringing a case if he becomes aware during the course of litigation that the claim is groundless. *Standage v. Jaburg & Wilk, P.C.*, 177 Ariz. 221, 866 P.2d 889 (App.1994).

In determining whether to award fees under A.R.S. § 12-349, the Court is to consider the factors set forth in A.R.S. § 12-350. These include:

1. The extent of any effort made to determine the validity of a claim before the claim was asserted.
2. The extent of any effort made after the commencement of an action to reduce the number of claims or defenses being asserted or to dismiss claims or defenses found not to be valid.
3. The availability of facts to assist a party in determining the validity of a claim or defense.
4. The relative financial position of the parties involved.
5. Whether the action was prosecuted or defended, in whole or in part, in bad faith.
6. Whether issues of fact determinative of the validity of a party's claim or defense were reasonably in conflict.

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7. The extent to which the party prevailed with respect to the amount and number of claims in controversy.
8. The amount and conditions of any offer of judgment or settlement as related to the amount and conditions of the ultimate relief granted by the court.

Plaintiff had sufficient facts in his possession to determine whether he would be able to prove the falsity of the statement made about him before he brought this litigation. He knew or should have known that he would have to prove the falsity of the statement at issue to prevail.

Plaintiff conducted no discovery and did not provide his initial disclosure statement until after Defendant filed its motion for summary judgment. After the Court granted Rule 56 (f) relief, Plaintiff took the depositions of the reporter who wrote the story and the editor of the Sonoran News.

In his affidavit filed with his motion for Rule 56 (f) relief, Plaintiff did not deny that he lied to authorities with regard to his relationship with Chandra Levy.

He objected to as not relevant or reasonably calculated to lead to admissible evidence interrogatories asking whether he had (1) in at least one interview with law enforcement authorities denied that he had a romantic and/or sexual relationship with Chandra Levy, (2) had on at least one occasion admitted to law enforcement authorities that he had a romantic and/or sexual relationship with Chandra Levy, or (3) had in a July 6, 2001, interview, meeting or discussion with law enforcement authorities admitted to having had, or otherwise stated or implied that he had a romantic and/or sexual relationship with Chandra Levy and did not answer those interrogatories.

The Court has no information about the financial position of Plaintiff. Defendant is a small newspaper. It had no insurance to cover the cost of defending this lawsuit. The defense of this lawsuit has been financed from the personal funds of its editor and publisher.

Defendant prevailed on all aspects of Plaintiff's claim on its motion for summary judgment.

Applying an objective standard, the Court finds by a preponderance of the evidence that Plaintiff's claim is groundless.

The Court finds that Plaintiff's failure to deny that he lied to authorities in his affidavit and his refusal to answer interrogatories regarding whether or not he admitted or denied to authorities that he had a romantic and/or sexual relationship with Chandra Levy are evidence that

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he was aware the lawsuit should not have been brought. He failed to provide information that would establish the truth or falsity of the statement at issue in this litigation. Proving the falsity of the statement by clear and convincing evidence was an essential element of his cause of action. The Court finds by a preponderance of the evidence that his actions in bringing this lawsuit constituted harassment, and that the lawsuit was not brought in good faith.

In its discretion, the Court declines to award double damages up to \$5,000.00 pursuant to A.R.S. 12-349.

IT IS ORDERED awarding Defendant its reasonable attorneys' fees in the sum of \$41,209.00 and its nontaxable costs in the sum of \$1,471.42 pursuant to A.R.S. §12-349.